Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/00381/2020
[CCD HU/50125/2020]

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 January 2022	**On 27 January 2022**

Before:

The Honourable Mrs Justice Heather Williams
sitting as a Judge of the Upper Tribunal
Upper Tribunal Judge Gill

Between

Miss Jayanben Sureshbhai Patel — Appellant
(ANONYMITY ORDER NOT MADE)

And

The Secretary of State for the Home Department — Respondent

Representation:
For the Appellant: Ms S Anzani, of Counsel, instructed by Eagles Solicitors.
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The appellant, a national of India born on 17 September 1983, appeals against a decision of Judge of the First-tier Tribunal Sweet (hereafter the "judge") promulgated on 8 May 2021 following a hearing on 5 May by which the judge dismissed her appeal on human rights grounds (Article 8) against a decision of the respondent of 8 July 2020 to refuse her application of 30 August 2019 for indefinite leave to remain on the basis of long residence under para 276B of the Immigration Rules and to refuse leave to remain on the basis of her human rights (Article 8).

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2. In the decision letter, the respondent considered that the appellant's leave ended on 21 February 2018 and that she therefore could not show that she had 10 years' continuous lawful residence.

Immigration history

3. The appellant arrived in the United Kingdom on 19 September 2009 with leave to enter as a Tier 4 (General) Student valid until 10 February 2011. Her leave was subsequently extended, initially on the same basis and subsequently as a Tier 2 (General) Migrant, until 14 August 2017. She made an in-time application on 11 August 2017 for extension of her leave as a Tier 2 (General) Migrant which was refused on 9 January 2018. Her application for administrative review of the decision of 9 January 2018 was refused on 21 February 2018. On 8 March 2018, she made an application for leave to remain as a Tier 1 (Entrepreneur). The decision letter dated 8 July 2020 states that this application was made void on 8 October 2019. However, the decision letter dated 8 July 2020 also states that the application of 8 March 2018 was varied on 30 August 2019 to an application for indefinite leave to remain. The application for indefinite leave to remain was the subject of the decision of 8 July 2020.

The issues:

4. Ms Anzani appeared for the appellant before the judge. Para 21 of the judge's decision records that Ms Anzani accepted, despite her submissions in her skeleton argument submitted for the hearing before us (mistakenly dated 5 January 2021 and with a heading that incorrectly states "*For Hearing on 12 January 2021*") (hereafter the "appellant's 2022 skeleton argument"), that the appellant could not satisfy the requirement in para 276B of the Immigration Rules for 10 years' continuous lawful residence on the basis that her leave had expired on 21 February 2018.

5. Before us, Ms Anzani accepted that her grounds of appeal did not include any challenge to the fact that the judge had stated that it was accepted before him that the appellant could not satisfy para 276B. Ms Anzani accepted that she therefore did not have permission to argue the point, despite the fact that paras 19-21 of the appellant's 2022 skeleton argument relied upon the dissenting judgment of McCombe LJ in Hoque & Ors v SSHD [2020] EWCA Civ 1357 and contended that the decision of the majority in Hoque was wrong.

6. In any event, there is no evidence to support the assertion at para 21 of the appellant's 2022 skeleton argument that it had been submitted before the judge that Hoque was wrongly decided and that "*in the alternative, the appellant invited [the judge] to allow her appeal outside the rules so as to enable her to regularise her position in light of the overwhelming confusion brought about by the unclear and perplexing wording of paragraph 276B".*

7. Ms Anzani also accepted before us that her grounds did not include the issues raised at paras 29-33 of the appellant's 2022 skeleton argument. Paras 29-33 relied upon family life said to exist between the appellant and her sister and her sister's children as well as the impact of the appellant's removal on the human rights of the appellant's sister and children that (it is contended) fell to be considered in line with the guidance in Beoku-Betts [2008] UKHL 39. Ms Anzani informed us that the submissions at paras 29-33 of the appellant's 2022 skeleton argument were relevant in order to establish the materiality of any errors of law in the judge's decision.

8. Accordingly, the issues in this appeal are limited to the grounds of appeal which we summarise below.

The judge's decision

9. At paras 19-20 of his decision, the judge summarised the submissions advanced on the appellant's behalf. It was argued before the judge that the situation in India was "*very difficult at the moment with the Covid outbreak*" with "*covid numbers … escalating in India*"; that there would be *"very significant obstacles to [the appellant] returning to India"*; that she has underlying health conditions including high blood pressure and would be at an increased risk on return; that she has been receiving treatment in the United Kingdom for her existing blood pressure; and that it would not be proportionate to remove her to India.

10. The judge gave his reasons for finding that the decision was not in breach of the appellant's rights under Article 8 at paras 21-23 which, insofar as relevant, read as follows:

> "21. The burden of proof is on the appellant and the civil standard of the balance of probabilities applies. The appellant first came to the UK in 2009 with leave to stay as a student and that student leave was subsequently extended until 30 April 2014. She has obtained qualifications in the UK, both in respect of business administration and innovation and marketing, but she also has qualifications in India, both in Arts and in computers. She also has an interest in pursuing a career in the beauty business in the UK which was described as a fashionable country….
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> 22. The only possible way in which the appellant's appeal can therefore be pursued is in respect of Article 8 ECHR outside the Immigration Rules. I reject that claim. She has normal emotional ties with her sister (who is a British citizen) and her sister's children (aged 3 and 5). It was not clear whether they actually lived together as different house numbers in the same road were given in their respective witness statements. She lived in India for 25 years before coming to the UK in 2009. She has her parents and brother living in India, and she can stay in the same accommodation there, as she did before she came to the UK. There is no reason why she cannot stay with them again. In respect of her extensive qualifications, she would be able to find a job in India, albeit with lower earnings, but she has not made any effort to find opportunities in that country. There is also no reliable evidence either from herself or her sister that the sister's financial support would not be able to be continued, though it may be difficult. She would be able to continue such relations with her sister and family through modern means of communication. Furthermore her sister used to visit India once or twice a year before the pandemic and there was no reason why those visits will not continue in the future after the current Covid crisis in India has concluded.
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> 23. I also take into account Section 117B of the Nationality, Immigration and Asylum Act 2002 that immigration control is in the public interest. Under Section 117B(5) little weight should be given to the appellant's status while her leave has been precarious."

11. The judge then said, at para 24, as follows:

> "24. Though I dismiss the appeal, the respondent will no doubt consider whether limited leave should be given while the pandemic crisis in India currently pertains."

Grounds of appeal

12. The grounds contend:

(i) (Ground 1, paras 4-5 of the grounds): The judge failed to undertake any analysis of para 276ADE(1)(vi) of the Immigration Rules and decide whether there would be very significant obstacles to the appellant's reintegration in India in light of the public health epidemic there (para 5 of the grounds), the "*well-documented Covid-19 outbreak there"* (para 4 of the grounds) and her health. In relation to

the latter, it is said that the appellant has "*underlying health conditions, including high blood pressure*"; "*this pre-existing heart condition means she is medically vulnerable and would place her at increased risk if indeed return were even capable of being facilitated*"; that the appellant had argued that it would not be proportionate to remove her to India; and that leave should be given, if only for a limited time, to enable the situation in India to be monitored. The judge erred at para 24 because it was incumbent upon him to make the assessment as part of the proportionality balancing exercise in deciding the appellant's Article 8 claim outside the Immigration Rules.

(ii) (Ground 2, para 7 of the grounds): In the alternative, the judge erred at para 22 of his decision in stating that it was unclear whether the appellant and her sister actually live together. In this regard, the judge failed to take into account the evidence that the appellant lives in a property owned by her sister on the same street as her sister, brother-in-law and their children.

Assessment

13. We took some time at the hearing to establish precisely what evidence was before the judge in order to establish: (i) what evidence he had before him concerning the appellant's health; and (ii) what evidence he had before him in relation to the situation in India concerning the Covid-pandemic.

14. Ms Anzani informed us that the medical evidence before the judge included 54-pages of evidence which showed that the appellant had undergone medical investigations. Upon being pressed, she confirmed that the totality of the evidence before the judge showed that the appellant had high blood pressure for which she was taking medication. There was no evidence before the judge that she suffered from any other medical condition.

15. In addition, Ms Anzani confirmed that the 38-page bundle on the Upper Tribunal's file, entitled: *"Objective bundle, India Doc 1. Covid 19 situation in India*" was not before the judge. This bundle was submitted to the Upper Tribunal in support of the appeal to the Upper Tribunal. Ms Anzani confirmed that there was no evidence at all before the judge concerning the Covid-pandemic in India. Mr Melvin informed us that he had checked the CCD database which he said did not contain any evidence regarding the Covid-situation in India.

16. We now turn to assess ground 1.

17. In the first place, it is not entirely clear that para 276ADE(1)(vi) of the Immigration Rules was relied upon before the judge. Paras 19-20 of his decision summarising the submissions advanced before him on the appellant's behalf refer to a submission that *"there would be very significant obstacles to [the appellant] returning to India*". This suggests reliance upon the practicality of the appellant returning to India which is not the same as whether there would be very significant obstacles to her reintegration in India.

18. In the event that para 276ADE(1)(vi) was relied upon before the judge, we accept that he erred in failing to consider whether there were very significant obstacles to the appellant's reintegration in India. However, even in that event:

(i) In view of the fact that there was no objective evidence before him concerning the Covid-pandemic in India, any assessment of the appellant's case under para 276ADE(1)(vi) (or her Article 8 claim outside the Immigration Rules) could

not have included an assessment of the situation in India relating to the Covid-pandemic.

(ii) We accept that the judge did not mention the appellant's health at paras 21-22 of his decision. However, it is clear from paras 10 and 12 of his decision that he was aware that she had high blood pressure and that she was taking blood pressure medication. There is therefore no reason to suppose that he did not take these matters into account in assessing the appellant's Article 8 claim and reaching his finding that the appellant's removal would not be in breach of Article 8. In any event, Ms Anzani did not suggest that there was any evidence before the judge that blood pressure medication would not be available to the appellant in India.

(iii) In this particular case, the appellant's case under para 276ADE(1)(vi) rests on facts that are narrower in ambit than her Article 8 claim outside the Immigration Rules, in that, her case under para 276ADE(1)(vi) does not include, and could not have included, her relationship with her sister and her sister's children. This is because it was not argued before the judge that the appellant's relationships with her sister and her sister's children were relevant in assessing whether there were very significant obstacles to her reintegration in India, nor can we see how that could have been argued given the judge's unchallenged finding at para 22 that the appellant enjoys normal emotional ties with her sister and her sister's children.

(iv) We have noted Ms Anzani's submission before us that paras 29-33 of the appellant's 2022 skeleton argument, which included submissions in relation to family life, were relevant in deciding whether any error of law made by the judge was material. However, this submission simply ignores the fact that the judge's finding (implicitly made) that the appellant did not enjoy family life with her sister and her sister's children was not challenged in the grounds. In effect, Ms Anzani's submission amounts to an attempt to get around the fact that her grounds did not challenge the judge's finding that the appellant did not enjoy family life with her sister and her sister's children.

(v) The judge's reasoning at paras 21-22 (quoted at our para 10 above) in relation to the appellant's Article 8 claim is relevant to any assessment of the appellant's case under para 276ADE(1)(vi). At paras 21-22, the judge plainly considered the obstacles to the appellant re-establishing her private life in India even if he did not express himself in that way.

19. For the reasons given by the judge at paras 20-21 of his decision and our paras 18(i)-(v) above, if the judge had considered the appellant's case under para 276ADE(1)(vi) (even if that had been relied upon before him), it is inevitable, on any reasonable view, that he would have found that there were no very significant obstacles to the appellant's reintegration in India.

20. Insofar as ground 1 also challenges the judge's assessment of the appellant's Article 8 claim outside the Immigration Rules, we are satisfied that he did not err in law by failing to assess the situation in India relating to the Covid-pandemic for the reasons given at our para 18(i) above. As we have said at para 18(ii) above, there is no reason to suppose that, in assessing the appellant's Article 8 claim, the judge did not take into account that she had high blood pressure and that she was taking blood pressure medication. In any event, as we have said, Ms Anzani did not suggest that

there was any evidence before the judge that blood pressure medication would not be available to the appellant in India.

21. For all of the reasons given above, we reject ground 1.

22. Ground 2 is hopeless. The judge said at para 22 that it was not clear whether the appellant and her sister lived together, noting that the addresses given in the witness statements of the appellant and her sister were for different house numbers in the same street. As Ms Anzani appeared to accept before us, that it seems that the judge proceeded on the basis that the appellant and her sister lived in different properties in the same street, which was in fact the correct position. However, if he incorrectly proceeded on the basis that they lived together, the error cannot possibly be said to be material to the outcome, on any reasonable view.

23. For all of the reasons given above, we are satisfied that the judge did not materially err in law.

24. We therefore dismiss the appeal.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of any error of law sufficient to require it to be set aside. We dismiss the appellant's appeal to the Upper Tribunal.

Signed
Upper Tribunal Judge Gill Date: 15 January 2022

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**
3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**
5. **A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.**
6. **The date when the decision is "sent' is that appearing on the covering letter or covering email**